NO. 82-2062

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CHICK KAM CHOO, ETC., ET AL.,
Petitioners

v.

EXXON CORPORATION, ETC., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES PATRICK COONEY
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

Attorney for Respondents

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

NO. 82-2062

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CHICK KAM CHOO, ETC., ET AL.,
Petitioners

v.

EXXON CORPORATION, ETC., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Judges of the Supreme Court of the United States:

COMES NOW, Exxon Corporation, Esso Tankers, Inc. and Esso Exploration Incorporated, Respondents,[1] and

1. The Defendants named in the Original Complaint in Civil Action No. H-78-628 in the Southern District of Texas were Esso Oil Company, a non-existent entity, Esso Exploration, Inc., and Exxon Company, U.S.A., an unincorporated division of the Exxon Corporation. The Defendants named in Civil Action No. H-78-477 in the Southern District of Texas were the Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., an unincorporated division of Exxon Corporation. The two Civil Actions were consolidated by the District Court.

file this their Brief in Opposition To The Petition For Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

The Petitioners are seeking review of the affirmance by the Fifth Circuit Court of Appeals of a denial by the United States District Court for the Southern District of Texas of a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment entered in this consolidated action on July 31, 1980, dismissing the action under the doctrine of *forum non conveniens.*

A. Course of Proceedings and Disposition in Court Below.

This case involves two wrongful death actions seeking recovery for the deaths of three Singaporean shipyard workers who were killed while working on the ESSO WILHELMSHAVEN at Sembawang Shipyard, Singapore, in two separate incidents during March, 1977. The first action (C.A. No. H-78-477) was filed in the United States District Court for the Southern District of Texas on March 14, 1978; the second action (C.A. No. H-78-628) was filed in the same court on April 10, 1978. Motions to consolidate, for summary judgment and to dismiss under the doctrine of *forum non conveniens* were filed by the Respondents on March 26, 1979. The two actions were consolidated by the district court on August 9, 1979. The motions for summary judgment and to dismiss on the basis of the doctrine of *forum non conveniens* were referred to the United States Magistrate, who filed his Memorandum and Recommendation on June 23, 1980.

The Magistrate recommended to the district court that the Respondents' motions be granted and that the consolidated actions be dismissed. The district court entered its Order of Dismissal and Final Judgment on July 31, 1980. No notice of appeal was filed. Petitioners filed their motion to set aside the judgment pursuant to Rule 60(b) on October 22, 1980, almost two months after the time for appeal had expired. This motion was denied by the district court on December 8, 1981. A Notice of Appeal from the denial of Petitioners' Rule 60(b) motion was filed on January 11, 1982. The denial of the Rule 60(b) motion was affirmed by the United States Court of Appeals for the Fifth Circuit on January 24, 1983, and Petitions for Rehearing and Rehearing *En Banc* were denied on March 11, 1983, 699 F.2d 693 (5th Cir. 1983).

B. Statement of Facts.

These consolidated actions seek to recover damages for the deaths of three Singapore shipyard workers who were killed in Singapore while working aboard the S/T ESSO WILHELMSHAVEN, while the vessel was undergoing repairs at the Sembawang Shipyard. The decedents Teo Ho Aik and Koo Ming Kuang met their deaths on March 13, 1977, as the result of an explosion during welding operations aboard the vessel. The decedent Leong Chong met his death on March 24, 1977, as a result of being struck on the head by a piece of metal while engaged in repair work aboard the vessel. Petitioners sought to recover under the Jones Act, 46 U.S.C.A. § 688; the Death on the High Seas Act, 46 U.S.C.A. § 761, *et seq.*; the Texas Wrongful Death Statute, Tex. Rev. Civ. Stat. Ann., Art. 4671-78 (Supp. 1982); the Texas Survival

Statutes, Tex. Rev. Civ. Stat. Ann., Art. 5525 (1958); the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, *et seq.;* and the general maritime law of the United States, common law negligence and common law products liability and/or marine products liability.

The ESSO WILHELMSHAVEN is a steam turbine tanker built in Germany in 1970 and documented under the laws of the Republic of Liberia. (R. Vol. 1, p. 27) She is of 113,752 gross tons, and has a length of approximately 1,141 feet and a draft of approximately 65 feet. (R. Vol. 2, p. 228) At the time of the two incidents and at all other material times, the vessel was owned by Esso Tankers Inc., a corporation existing under the laws of the Republic of Liberia, which is an indirectly owned affiliate of the Exxon Corporation (R. Vol. 2, p. 100), and managed by Exxon International Company, an unincorporated division of Exxon Corporation, pursuant to a Marine Service Agreement existing between Esso Tankers and Exxon International. At all material times the vessel's officers and unlicensed crew were Italian nationals hired for Esso Tankers. (R. Vol. 1, p. 27) The vessel never called in the United States prior to the accidents here in question. Following the accidents, the vessel made one visit to St. Croix in the Virgin Islands in January, 1979. (Affidavit of Rudolph W. Haessner filed August 2, 1979, hereinafter referred to as "Haessner Affidavit"). See Order granting motion to correct record filed December 22, 1983.

The ESSO WILHELMSHAVEN was in the Sembawang Shipyard in March of 1977 for dry docking and repair pursuant to a Repair Contract between Exxon and Sem-

TRULY CREW LIST

RANK/RATING	NAME		VALID D-VISA (YES OR NO)	ENLIST. DATE	DATE JOINED VESSEL	DATE DISEMBARK	PORT	*REASON
MASTER	DEVENDA	Claudio	Yes	12.1.76	12.2.76			
Ch.Mate	DE ROSA	Michele	Yes	8.27.76	8.31.76	3.9.77	Singapore	Vacation
Ch.Mate	COPELLO	Antonio	Yes	3.1.77	3.4.77			
2ndMate	[illegible]AN	Mario	Yes	11.11.76	11.26.76			
2ndMate	SEGRE	Francesco	Yes	10.7.76	10.9.76	3.21.77	Singapore	Vacation
2ndMate	PADALUCCO	pietro	Yes	11.19.76	11.26.76			
3rdMate	SPINOSA	Pasquale	Yes	3.18.77	3.21.77			
R.O.	LISTER	Mario	Yes	1.10.77	1.14.77			
C. Engr.	SCLABANI	Sergio	Yes	1.10.77	1.14.77			
1stEng.	ARRAGE	Luigi	Yes	1.10.77	1.14.77			
2ndEngr.	CACCIATORE	Antonio	Yes	10.7.76	10.9.76	3.30.77	Singapore	Vacation
2ndEngr.	BORRELLO	Salvatore	Yes	11.19.76	11.26.76			
2ndEngr.	COSENZA	Luigi	Yes	1.10.77	1.14.77			
3rdEngr.	VELLUCCI	Cosmo	Yes	3.28.77	3.30.77			
Asst'n	ARAGNA	Vincenzo	Yes	1.18.77	1.31.77			
Fireman	VALORI	Riccardo	Yes	11.19.76	11.26.76			
A.B.	ROMANO	Marco	Yes	2.2.77	2.11.77			
A.B.	GERMINARIO	Mauro	Yes	2.2.77	2.11.77			
A.B.	Maccina	Salvatore	Yes	1.10.77	1.14.77			
A.B.	ALFIERI	Vito	Yes	1.10.77	1.14.77			
A.B.	ALMAGNE	Carlo	Yes	8.27.76	8.31.76	3.4.77	Singapore	Vacation
A.B.	CONTINA	Agatino	Yes	11.19.76	11.26.76			
A.B.	VULPASSO	Francesco	Yes	11.19.76	11.26.76			
A.B.	[illegible]EPE	Natale	Yes	10.7.76	10.9.76	3.21.77	Singapore	Vacation
Electr.	PINEVENTELA	Carmelo	Yes	10.7.76	10.9.76	3.30.77	Singapore	Vacation
[illegible]Electr.	ANSALDO	Enrico	Yes	3.1.77	3.4.77			
Cuchin	PRINCIPE	Corrado	Yes	10.2.76	10.9.76	3.21.77	Singapore	Vacation
Mechic.	PRIZIO	Nicolo'	Yes	11.19.76	11.26.76			

TOTAL NUMBER OF MEN ABOARD: 38

*OTHER THAN AUTHORIZED COMPLEMENT, INDICATE JOINING VESSEL FOR FAMILIARIZATION, SUPERNUMERARY, TRAINING (INCLUDING CADETS) ETC., OR DISEMBARKING FOR VACATION, TRANSFER TO OTHER VESSEL, MEDICAL, ETC.

SEE IA INSTRU

RANK/RATING	NAME		VALID D-VISA (YES OR NO)	ENLIST. DATE	DATE JOINED VESSEL	DATE DISEMBARK	PORT	*REASON
MstrMachin	HUGHERVIGI	Gaspare	Yes	3.18.77	3.21.77			
Oiler	LO BASSO	Ciro	Yes	1.10.77	1.14.77			
Oiler	INGRAVALLO	Ottavio	Yes	11.19.76	11.26.76			
Oiler	SESCA	Francesco	Yes	10.2.76	10.9.76	3.21.77	Sincenare	Vacation
Oiler	SALUSTIO	Pantaleo	Yes	3.18.77	3.21.77			
Oiler	SEENA	Vincenzo	Yes	1.10.77	1.14.77			
Oiler	PAPAROSA	Vincenzo	Yes	10.2.76	10.9.76	3.21.77	Sincenare	Vacation
Oiler	PALUMBO	Pasquale	Yes	3.18.77	3.21.77			
Cook	POLIGNOMI	Enrico	Yes	1.10.77	1.14.77			
2ndCook	GIARDINA	Francesco	Yes	1.10.77	1.14.77			
MessMan	TAMBACCO	Ruggero	Yes	3.1.77	3.4.77			
MessMan	MAGARELLI	Vito	Yes	8.27.76	8.31.76	3.4.77	Sincenare	Vacation
MessBoy	TARANTINO	Vincenzo	Yes	8.27.76	8.31.76	3.4.77	Sincenare	Vacation
MessBoy	DAMASCO	Domenico	Yes	3.1.77	3.4.77	3.31.77	Sincenare	Relief
		SUPERNUMERARIES						
Jr.Mate	MAZZELLA	Vincenzo	Yes	11.19.76	11.26.76			
Jr.Eng.	DI SCANIO	Raffaele	Yes	10.2.76	10.9.76	3.31.77	Sincenare	Vacation
Jr.Eng.	CONICELLI	Pasquale	Yes	3.28.77	3.30.77			
Fireman	TUVERE	Angelo	Yes	2.2.77	2.11.77			
WTR/TNDR	D. SCISCIOLO	Gaetano	Yes	2.2.77	2.11.77	3.4.77	Sincenare	Vacation
A.B.	PIGNATELLI	Luigi	Yes	2.2.77	2.11.77			
A.B.	DE PIETO	Ignazio	Yes	2.2.77	2.11.77			
A.B.	MARCELLA	Vittorio	Yes	2.2.77	2.11.77			
A.B.	DI JANNI	Antonio	Yes	2.2.77	2.11.77	3.4.77	Sincenare	Vacation
Stew.Sp	MIGI	Vitina	No	1.31.77	1.31.77			
Stew.Sp	VALERIO	Rita	No	3.4.77	3.4.77			

NUMBER OF MEN ABOARD: 38

*OTHER THAN AUTHORIZED COMPLEMENT, INDICATE JOINING VESSEL FOR FAMILIARIZATION, SUPERNUMERARY, TRAINING (INCLUDING CADETS), ETC., OR DISEMBARKING FOR VACATION, TRANSFER TO OTHER VESSEL, MEDICAL, ETC.

SEE BAC
INSTRUC

bawang. The vessel entered the Sembawang Shipyard on March 2, 1977, and entered dry dock on March 3, 1977. On March 10, 1977, the vessel left dry dock and was shifted to Sembawang Berth No. 12 for additional repairs, including the welding of plates and brackets in the vessel's No. 3 port tank. Repairs were completed and the vessel proceeded to sea on March 31, 1977. (R. Vol. 2, pp. 63-68)

Petitioners' decedents, Koo Ming Kuang and Teo Ho Aik, were welders employed by Roma Project Engineering Company of Singapore ("Roma Project"), and were provided to Sembawang for work on ships under repair at the Sembawang Shipyard, including the ESSO WILHELMSHAVEN. They were under the direct supervision of the Chargeman of Roma Project's welding section, who resides in Singapore. The Roma Project welders were, in turn, under the supervision of A. Marimuthu, the Chargeman for Sembawang Shipyard's welders/burners section, who resides in Singapore. The shipyard workers, including the decedents, who were involved in the vessel's dry docking and repairs were not under the direct or indirect control or supervision of the Respondents or any of the vessel's officers or crew. (R. Vol. 2, pp. 63-65, 132-33, 153-60, 169-71, 172-74)

On March 10, 1977, the vessel's No. 3 port tank was inspected by the Senior Port Chemist of the Port of Singapore Authority, at the request of the Safety Officer of Sembawang Shipyard, and a gas free certificate was issued. The tank was again inspected on the morning of March 13, 1977, by the Shipyard Safety Officer and found to be safe. Sometime thereafter the deceased, along with another welder employed by Roma Project, entered

the No. 3 port cargo tank of the vessel and began welding collar plates. (R. Vol. 2, pp. 142-48, 153-54, 161-68) At approximately 2:35 o'clock p.m. on March 13, 1977, there was an explosion in the No. 3 port tank. Koo and Teo were killed and the third man was knocked unconscious. (R. Vol. 2, pp. 65, 154, 162) The incident was investigated by the Singapore government and a Coroner's Inquest was held, which returned an open verdict in respect to the deaths of both deceased. (R. Vol. 2, p. 135, *et seq.*)

Decedent Leong Chong was employed as a steel worker by Sembawang. On March 24, 1977, the deceased was sent to the lower engine room of the vessel to carry out certain repairs. While in this area the deceased was struck on the head by a valve spindle or other piece of metal and sustained a fractured skull and contusion to the brain and died as a result. At the time of his accident, the deceased was under the direct supervision and control of Sembawang. (R. Vol. 1, pp. 26, 43) The valve spindle that struck the deceased allegedly fell through an access hole from the vessel's machine shop. The only eyewitnesses to the accident were an apprentice pipe worker and a steel worker employed by Sembawang, both of whom reside in Singapore (R. Vol. 1, pp. 100, 111); and a member of the crew of the vessel, whose permanent residence is in Italy (Haessner Affidavit).

ARGUMENT

This Petition presents a classic example of an attempt to employ Rule 60(b) as a substitute for appeal. For whatever reason, Petitioners failed to file a timely notice of appeal from the final judgment entered in this cause

on July 31, 1980, as required by Rule 4 of the Federal Rules of Appellate Procedure.[2] On October 22, 1980, a motion to set aside this judgment was filed pursuant to Rule 60(b) of the Federal Rules, alleging that the Petitioners' failure to appeal on a timely basis was the result of excusable neglect on the part of their counsel and urging that the judgment be set aside because the trial court had committed numerous mistakes of law in rendering its judgment. Petitioners' Rule 60(b) motion was denied by the district court by a minute entry dated December 8, 1981, and this denial was promptly appealed. In affirming the district court, the Court of Appeals held that the legal errors allegedly committed by the district

---

2. Petitioners' attorney attempts to excuse his failure to file an appeal by representing to the Court that Petitioners' counsel were in the process of transferring representation, suggesting that the Petitioners were temporarily without counsel. The record will not support this representation. Mr. Musslewhite, Petitioners' present counsel, appeared as a counsel of record in C.A. No. H-78-628 as early as April 10, 1978, when the Original Complaint was filed. (R. Vol. 2, pp. 1, 7). Mr. Louis R. Koerner, Jr., was added as "additional counsel" by Mr. Musslewhite on October 30, 1978 (R. Vol. 2, p. 17). On June 13, 1980, Cynthia A. Norris, an associate of Mr. Koerner's, was allowed by order to withdraw. (R. Vol. 1, p. 135) The Magistrate's Memorandum and Recommendation was not filed until June 23, 1980, and Objections were filed to the Magistrate's Memorandum and Recommendation in behalf of the Petitioners on July 11, 1980. (R. Vol. 1, p. 142) Mr. Robert A. Chaffin served as the Petitioners' attorney-in-charge in C.A. No. H-78-477 until October 6, 1981 more than a year after entry of the Final Judgment, when Mr. Musslewhite formally took over as attorney-in-charge. (R. Vol. 1, pp. 240-241) It seems that the Petitioners were blessed with too many lawyers rather than too few. There were three individual attorneys in the case for the Petitioners when the Final Judgment was entered but none of them felt constrained to file a notice of appeal. At the same time, there is no showing of abandonment by the attorneys of record in this case similar to that which occurred in the *Seven Elves v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981). The proffered explanation as to why no timely appeal was taken is a tacit admission by counsel that the proper method of review was appeal and not a Rule 60(b) motion.

court, if indeed they were errors, were not so obviously incorrect as to constitute a fundamentally misconceived ruling for which relief might be available under Rule 60(b). Having failed to have obtained a full blown review of the underlying judgment from the Court of Appeals as a result of their Rule 60(b) motion, the Petitioners are now before this Honorable Court urging that the Court of Appeals be required to review the dismissal of this cause as if the judgment itself had been timely appealed. Such a review is not available under Rule 60(b).

None of the tradition predicates that underlie a petition for a writ of certiorari are presented by this Petition. There is no conflict among the various circuits nor is the holding below at variance with any of the decisions of this Court so as to call for the exercise of this Court's powers of supervision. Finally, no question of federal law of overriding national concern is presented that would require the intervention of this Court. *See* Rule 17, Revised Rules of the Supreme Court of the United States, 28 U.S.C. All that this Petition is about is a continuing effort by counsel for the Petitioners to obtain a full review through Rule 60(b) of the underlying judgment dismissing this case under the doctrine of *forum non conveniens.*

A. There is no Conflict with the Decisions of this Court.

In their primary thrust to justify the issuance of a writ, the Petitioners urge that the court below unreasonably and improperly narrowed the scope of Rule 60(b) in such a way as to conflict with *Link v. Wabash,* 370 U.S. 625, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), and *Klapprott v. United States,* 335 U.S. 601, 69 S.Ct. 384, 93

L.Ed. 266 (1949). A review of these decisions, however, makes it readily apparent that the holding below is not in conflict with the holding of either case.

Link v. Wabash, supra, in fact did not even deal with Rule 60(b). Instead, it dealt with an appeal from the dismissal of a civil action for want of prosecution when counsel failed to appear at a pre-trial hearing. In upholding the dismissal, the Court observed that it was not required to consider whether the district court would have abused its discretion in rejecting a Rule 60(b) motion since no such motion had been filed. This gratuitous aside obviously suggests that the result might have been different had such a motion been filed.

Klapprott v. United States, supra, dealt with what the Court itself characterized as an "extraordinary situation." A native of Germany who became a naturalized citizen in 1933 had his citizenship cancelled by entry of a default judgment in a civil action in 1942 while he was being held in the custody of the United States because of alleged seditious activity. The entry of the default judgment resulted directly from interference by government agents. At the end of the war against Germany the sedition charges were dismissed by the Government for want of evidence. A divided Court held that Rule 60(b)(6), providing for the setting aside of judgments for "any other reason justifying relief from the operation of the judgment," was applicable because of the extraordinary situation presented by the case.

Both of the cases relied upon by the Petitioners in their attempt to create a conflict deal with the entry of a judgment before the merits of the cause had been fully considered. Here, the judgment which is sought to be set

aside, even though a judgment going to the threshold questions of choice of law and dismissal under the doctrine of *forum non conveniens,* is based on a fully developed record and is a full adjudication on the merits. The judgment here did not arise out of a default or a sanction imposed by the district court upon either the Petitioners or their attorneys. Petitioners' counsel valiantly attempts to rely on his failure timely to appeal as a link to the cases liberally setting aside default judgments under Rule 60(b). However, Rule 60(b) by its very terms looks to the *entry* of a final judgment and relief therefrom, and does not deal directly with or provide relief from a failure to *appeal* final judgments. Moreover, this Petition does not present an "extraordinary situation" as was the case in *Klapprott* to justify the invocation of Clause (6) of the Rule. Rather, the Court is presented with a now almost routine "foreign claimant" maritime case of the type that has become perhaps all too familiar to many of our district courts, distinguished only by the failure of the claimants' attorneys to file a timely appeal because of admitted neglect.

Klapprott, supra, must be read in the light of *Ackerman v. United States,* 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) and *Polites v. United States,* 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960), both of which involve unsuccessful attempts to set aside judgments of denaturalization under Rule 60(b)(6). Both of these decisions make it clear that *Klapprott* "was a case of extraordinary circumstances." *Ackerman v. United States, supra,* 340 U.S. at 199. Since no extraordinary circumstance is presented by this case, the decision below is not in conflict with *Klapprott,* or any decision of this Court dealing with relief under Rule 60(b).

B. The Decision of the Fifth Circuit is Consistent With Existing Case Law.

The decision below is also consistent with prior holdings of the Fifth Circuit, and, for that matter, with the general approach being taken by the other circuits to Rule 60(b). In deciding this case, the Fifth Circuit followed the almost identical case of *Alvestad v. Monsanto Co.*, 671 F.2d 908 (5th Cir. 1982), *cert. den.*, ____U.S.____, 103 S.Ct. 489, 74 L.Ed.2d 632 (1982). Both cases involve an effort by the same attorney (Mr. Musslewhite) to obtain relief under Rule 60(b) from the dismissal under the doctrine of *forum non conveniens* of maritime claims asserted by foreign nationals in the United States after having failed to seek review by way of appeal. Both this case and *Alvestad* stand for the proposition that Rule 60(b) cannot be used as a substitute for appeal. While it is now accepted that Rule 60(b) may properly be employed to allow a district court to correct certain mistakes of law, the decisions also recognize that there must be a balance. Thus, in *Alvestad* the court observed that while Rule 60(b) can be used "to reform a judgment in obvious conflict with a clear statutory mandate, we have been equally insistent that Rule 60(b) is not a substitute for the ordinary method of redressing judicial error—appeal." *Id.* at 912. In *Gary W. v. Louisiana*, 622 F.2d 804 (5th Cir. 1980) *cert. den.*, 450 U.S. 994 (1981), the Fifth Circuit held that Rule 60(b) cannot be employed in lieu of appeal to review the application by the trial court of an incorrect legal standard. *See Fackelman v. Bell*, 564 F.2d 734, 735, 737 (5th Cir. 1977).

The cases which allow Rule 60(b) to be employed as a device to obtain relief from a "mistake of law" either

involve the misapplication of clear statutory law, *Compton v. Alton Steamship Co.*, 608 F.2d 96 (4th Cir. 1979); *Meadows v. Cohen*, 409 F.2d 750 (5th Cir. 1969), or a change in the controlling decisional law taking place after the entry of the judgment. *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976); *Oliver v. Home Indemnity Co.*, 470 F.2d 329 (5th Cir. 1972). The district court below did not misapply a facially clear statute in dismissing the Petitioners' claims and there have been no changes in controlling decisional law that would have altered the outcome of this case since the entry of judgment. The most the Petitioners can claim is the possibility of a misapplication of established legal standards by the trial court (a claim the Respondents unequivocally reject.) As a result the Fifth Circuit was correct in holding that there could be no relief from the district court's judgment under Rule 60(b).

C. The Judgment Below is not Based on a Fundamental Misconception of the Law.

The Petitioners contend that the district court made several facially clear errors and fundamental legal misconceptions in dismissing the Petitioners' claims under the doctrine of *forum non conveniens*, including a refusal to apply the tenets of *Lauritzen v. Larson*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1730, 26 L.Ed. 2d 252 (1970); disregard of a forum selection clause in a contract; failure to make a correct analysis of the convenience of the parties; failure to analyze the law of Singapore; disregard of 46 U.S.C. § 764, the Shipowners' Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, 28 U.S.C. § 1350, and Article 4678 of the

Revised Civil Statutes of Texas. Finally, the Petitioners contend that the Death on the High Seas Act was extended by the Fifth Circuit after entry of the judgment to apply to the territorial waters of a foreign state. Each of these contentions will be briefly discussed.

1. Misapplication of the *Lauritzen/Rhoditis* Choice of Law Criteria.

Fundamental to the district court's choice of law analysis under *Lauritzen/Rhoditis* was its holding that the Petitioners' decedents were not seamen as a matter of law. Rather, their decedents were shipyard workers employed in the port of Singapore. In light of this, the district court was more than justified in finding more substantiality in the contacts with Singapore than the contacts with the United States. *Cf. Chiazor v. Transworld Drilling,* 648 F.2d 1015 (5th Cir. 1981) *cert. den.,* 455 U.S. 1019 (1982). Suffice it to say that a holding that the general maritime law of the United States applied here would have been as anomalous as holding that the law of Singapore applied to a claim arising out of the wrongful death of an American shipyard worker killed while working aboard a vessel in an American port because the vessel was indirectly owned and controlled by a Singaporean corporation.

2. Forum Selection Clause.

The contention that the forum selection clause contained in the Marine Service Agreement between the vessel owner and Exxon International was not raised below. Moreover, the notion that the law applicable to this case is to be controlled by a forum selection clause in an agreement between the owner and the operator of a vessel would

stretch the rationale of *Bremen v. Zapata*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) far beyond reason. *Cf. H. W. Caldwell & Son., Inc. v. U. S. for John H. Moon & Sons, Inc.*, 407 F.2d 21 (5th Cir. 1969).

3. Convenience of the Parties.

The Petitioners continue to insist that it would be more convenient to try this case in the United States because two American employees of Exxon were overseeing the repair of the vessel and because the Petitioners plan to use American experts. With the exception of the vessel's crew, who were Italian, virtually all of the potential fact witnesses are residents of Singapore, where virtually all of the documentary evidence is located. In the face of this, convenience was hardly even an issue.

4. Law of Singapore.

There is no question but that the courts of the Republic of Singapore are accessible to the Petitioners. Section 12 of Chapter 30 of the Civil Law Act, Singapore Statutes, Revised Edition 1970, provides a wrongful death remedy almost identical with the English Fatal Accident Act of 1946 to the family of a deceased person for death occasioned by the negligence of another. The High Court (Admiralty Jurisdiction) Act, Chapter 6, Sections 3 and 4, Singapore Statutes, Revised Edition, 1970, provides for both *in personam* and *in rem* jurisdiction in death actions as presented here (R. Vol. 2, pp. 192-194) and the Petitioners may also proceed against Exxon and Esso Tankers *in personam* under the High Court's civil jurisdiction pursuant to Section 16(1) of the Supreme Court of Judicature Act, Chapter 15, Singapore Statutes, Revised Edition, 1970. (R. Vol. 2, p. 200) The Petitioners

complain that the law of Singapore may not allow a waiver of the applicable statute of limitation under Singapore law, and yet they cite no authority that this is indeed the case (which it is not).

5. Section 764 of Title 46 U.S.C., Section 4 of the Death on the High Seas Act.

Section 764 is essentially a jurisdictional statute allowing our admiralty courts to entertain claims for wrongful death occurring on the high seas even though foreign law may apply. The district court opinion relied on by the Petitioners, *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D. N.Y. 1941), holds that an action under Section 764 must be brought in admiralty rather than on the law side of the court. It does not address the question of whether the district court can decline to exercise its admiralty jurisdiction in an appropriate case. As the Petitioners would have it, the federal courts are required to take and *retain* jurisdiction over all wrongful death actions where the death or the wrongful act occurs on the high seas (including the territorial waters of a foreign nation). Such a result would overburden our district courts and is absurd.

6. Shipowners' Liability Convention of 1936 and 28 U.S.C. § 1350.

The Shipowners' Liability Convention was not relied upon by the Petitioners below. Since the district court was not asked to consider it, the effect of the Convention, if any, is not properly before the Court. Moreover, maritime torts are not considered to be violations of the law of nations or any treaty of the United States. *Damaskinos v. Societa Navigacion Interamericana, S.A.*, 255 F. Supp.

919, 923 (S.D. N.Y. 1966); *Lopes v. Reederei Richard Schroder,* 225 F. Supp. 292, 295-297 (E.D. Pa. 1963).

7. Article 4678, Revised Civil Statutes of Texas.

Petitioners contend that Article 4678 of the Texas Civil Statutes required the district court to retain jurisdiction over this claim and, implicitly, that a federal court sitting in Texas can have its discretion to decline to exercise its jurisdiction under the doctrine of *forum non conveniens* controlled by the legislature of the State of Texas. Certainly such a position must fail under the Supremacy Clause of the United States Constitution. *See Kossick v. United Fruit Co.,* 365 U.S. 731, 738-39, 81 S.Ct. 886, 6 L.Ed.2d 56, 62-63 (1961). Article 4678 must be considered substantive law of the State of Texas. *See Penry v. Wm. Barr, Inc.,* 415 F. Supp. 126, 128 (E.D. Tex. 1976); *Gutierrez v. Collins,* 583 S.W.2d 312, 317 n.3 (Tex. 1979). As such, it is preempted by federal maritime law. *Lindgren v. United States,* 281 U.S. 38, 44-46, 50 S.Ct. 207, 74 L.Ed. 686, 691-92 (1930). The application of Article 4678 of the Texas Wrongful Death Statute to this cause would have flown in the face of the doctrine of uniformity of admiralty and maritime law. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086, 1098 (1917).

8. Application of DOHSA to Foreign Territorial Waters.

The Petitioners contend that following entry of judgment there was a change in controlling decisional law in that the Fifth Circuit extended the coverage of the Death on the High Seas Act, 46 U.S.C. § 761, *et seq.* (DOHSA) to include the territorial waters of a foreign nation. It is

submitted that no such post-judgment change in the controlling decisional law occurred.

By its terms, DOHSA applies to wrongful deaths "occurring on the high seas beyond a marine league from the shore of any State." The Ninth Circuit in *Roberts v. United States,* 498 F.2d 520 (9th Cir.), *cert. den.,* 419 U.S. 1070 (1974) declined to specifically decide whether DOHSA applied to the territorial waters of a foreign sovereign. In doing so, the Court said:

> The appellees' alternate reliance upon the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768, is more questionable. Although the Supreme Court has explicitly sanctioned the bringing of aviation wrongful death cases under a literal construction of the DOHSA, the facts alleged in the appellees' own brief cast doubt upon the statute's applicability. The appellees concede that the alleged tort occurred a maximum of 1900 feet from the Okinawa shore, i.e., in presumably foreign territorial waters. In view of the somewhat ambiguous language of the statute itself and the apparent lack of authority on the point, we hesitate to conclude whether a tort occurring within foreign territorial waters comes within the purview of the Death on the High Seas Act. (Footnote omitted.) *Id.* at 524.

In *Cormier v. Williams/Sedco/Horn Constructors,* 460 F. Supp. 1010, 1011 (E.D. La. 1978), it was held with little discussion that an inland river in Peru constituted the "high seas" for the purposes of DOHSA in a case involving the death of an American seaman. In *Mancuso v. Kimex, Inc.,* 484 F. Supp. 453, 454 (S.D. Fla. 1980), the district court held it had jurisdiction under the DOHSA in an airplane crash occurring in the territorial waters

of Jamaica resulting in the death of the plane's American flight engineer.

Neither *Cormier* nor *Mancuso* were binding on the district court below as it is well established that a decision of one district court is not binding on other district courts. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 457, 461 (E.D. Pa. 1972); *Porter v. Bowers*, 70 F. Supp. 751, 753 (W.D. Mo. 1947). Moreover, both of these cases were decided before entry of the district court's final judgment in this case and certainly cannot be categorized as post-judgment changes in controlling decisional law.

Both *Cormier* and *Mancuso* recognize that the meaning of "high seas" is crucial in a determination of the applicability of DOHSA to the territorial waters of a foreign nation. In this connection, it should be noted that the Fifth Circuit, in another context, has defined "high seas" as "all parts of the sea not included in the territorial or internal waters of a nation." *Treasure Salvors v. Unidentified Wreck, etc.*, 569 F.2d 330, 338 n.14 (5th Cir. 1978).

In *Sanchez v. Loffland Bros. Co.*, 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. den.*, 452 U.S. 962 (1981), which allegedly constitutes the post-judgment change in the decisional law, the Fifth Circuit held the two year statute of limitations under DOHSA applicable to a wrongful death action arising under the general maritime law involving the death of a seaman in Lake Maracaibo, Venezuela. In so doing, the Court did not address the issue of the applicability of DOHSA within the territorial waters of a foreign nation. However, in a footnote, the Court noted:

> DOHSA is applicable to the death of a person who is not a Jones Act seaman whenever the wrongful act occurs on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States. 46 U.S.C. § 761. The statute has been applied when the cause of action arises outside of United States territorial waters and within the territorial waters of a foreign country. *Public Administrator of the County of New York v. Angela Compania Mariera,* 592 F.2d 58 (2d Cir. 1979); *Mancuso v. Kimex, Inc.,* 484 F. Supp. 453 (S.D. Fla. 1980); *Cormier v. Williams/Sedco/Horn Constructors,* 460 F. Supp. 1010 (E.D. La. 1978). But *See, Roberts v. United States,* 498 F.2d 520 (9th Cir. 1974). *Id.* at 1230, n.4.

See also Public Administrator of County of New York v. Angela Compania Naviera, S.A., 592 F.2d 58, 64 (2nd Cir. 1979), *cert. dismissed,* 443 U.S. 928, 100 S.Ct. 15, 61 L.Ed.2d 897 (1979), where the Court held that the doctrine of laches is to be applied to the wrongful death actions brought under the general maritime law in light of the two year statute of limitations found in the Death on the High Seas Act.

THE STANDARD FOR REVIEW

The review of a denial of a motion pursuant to Rule 60(b) of the Federal Rules to set aside a final judgment is limited to the question of whether the district court abused its discretion in denying the motion. An appeal from such a motion is narrower than the review of a final order on appeal and does not bring up the underlying judgment for review. *Phillips v. Insurance Company of North America,* 633 F.2d 1165, 1167 (5th Cir. 1981);

Silas v. Sears Roebuck & Co., Inc., 586 F.2d 382, 386 (5th Cir. 1978). *See, Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 263 n.7, 98 S.Ct. 556, 54 L.Ed.2d 521, 530 n.7, *reh. den.* 434 U.S. 1089, 98 S.Ct. 1286, 55 L.Ed.2d 795 (1978). In *Seven Elves, Inc v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1981), the Court, in discussing the abuse of discretion standard used in reviewing the denial of Rule 60(b) motions, stated: "it is not enough that the granting of relief might have been permissible, or even warranted—denial must be so *unwarranted* as to constitute an abuse of discretion."

Petitioners incorrectly assert that the proper standard of review is "slight abuse" of discretion, relying on *Seven Elves, Inc. v. Eskenazi, supra.* The "slight abuse" standard applies only to judgments that dispose of an action other than on the merits, such as in the case of a default judgment. *Varnes v. Local 91 Glass Bottle Blowers Asso.,* 674 F.2d 1365, 1369 (11th Cir. 1982); *Ellingsworth v. Chrysler,* 665 F.2d 180, 185 (7th Cir. 1981); *Erick Rios Bridoux v. Eastern Air Lines,* 214 F.2d 207 (D.C. Cir. 1954), *cert. den.,* 348 U.S. 821 (1954). While the Court found it unnecessary to characterize the underlying judgment in the *Seven Elves* case, it is clear that it found that the judgment bore many of the characteristics of a default judgment because "the full merits of the cause were not examined." 635 F.2d at 403.

Any suggestion that the district court's final judgment of July 31, 1980, granting Respondents' motions for summary judgment and to dismiss under the doctrine of *forum non conveniens,* was not a judgment on the merits flies in the face of reality. The judgment was based on a

fully developed record containing numerous affidavits and exhibits, including the Notes of Evidence of the Singapore Coroner's Inquests into each of the three deaths out of which these cases arose. This record established the circumstances of each incident; the employment of each of the deceased; the background of the vessel, including the details of its relevant contacts with the United States, the availability of an appropriate wrongful death remedy under the laws of Singapore, including the fact that the Respondents are amenable to process in Singapore; and the names and nature of expected testimony of all known fact wtinesses, etc. Petitioners filed no controverting affidavits, nor did they obtain the deposition testimony of any witness, as required by Rule 56(e) of the Federal Rules of Civil Procedure, even though these actions pended for more than two years and Respondents' motions were on file for some sixteen months before the final judgment was entered.

In its Order of Dismissal, the district court adopted the Magistrate's Memorandum and Recommendation as its own. The Magistrate's Memorandum contained the following conclusions of law:

1. The deceased were not seamen within the meaning of the Jones Act.
2. The Death on the High Seas Act does not provide a remedy to the Petitioners.
3. The Longshoremen's and Harbor Workers' Compensation Act does not provide a remedy to the Petitioners.
4. The law of Singapore, rather than the law of the United States, controls the Petitioners' rights and remedies.

5. The Petitioners' actions should be dismissed under the doctrine of *forum non conveniens.*

On this basis, the district court exercised its discretion and dismissed the consolidated actions under the doctrine of *forum non conveniens.*

Since the underlying final judgment in this action was clearly a judgment on the merits, the "slight abuse" standard employed in the review of the denial of Rule 60(b) motions from default judgments is not applicable. The issue before the Court of Appeals was simply whether the district court's denial of the Appellants' Rule 60(b) motion was so *unwarranted* as to constitute an abuse of discretion. The Court of Appeals correctly applied that standard in affirming the district court.

CONCLUSION

The Petitioners' statement of the issues in the "Questions Presented For Review" found on the first page of their Petition for Certiorari belies the fact that what is actually being sought here is a review of the underlying judgment in the nature of an appeal, using Rule 60(b) simply as a device to accomplish that end. The Court below clearly understood the nature of the review being sought and properly refused to grant such a review, holding in essence that Rule 60(b) cannot be used as a substitute for the normal appellate process.

To grant to the Petitioners the review they seek would effectively emasculate the appellate process and allow litigants to obtain review of adverse judgments long after the time for appeal had passed upon the simple contention that the trial court committed legal error. Such a possi-

bility cannot be entertained. For this and the other reasons enumerated here, the Petition for Writ of Certiorari filed herein must be denied.

Respectfully submitted,

JAMES PATRICK COONEY
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

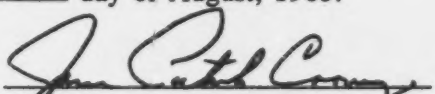
Attorney for Respondents

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Benton Musslewhite, Esq., 609 Fannin Street, Suite 517, Houston, Texas 77002, the attorney for the Petitioners herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this, the 5th day of August, 1983.



OF ROYSTON, RAYZOR, VICKERY & WILLIAMS